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Written statement* submitted by Friends of the Earth International, a non-governmental organization in consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

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* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

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Proposals for a Treaty on Transnational Corporations (TNCs) and other business enterprises in relation to Human Rights

Friends of the Earth International (FoEI), the largest grassroots environmental federation, uniting 75 national member groups and some 5,000 local activist groups on every continent, with over 2 million members and supporters around the world, has welcomed the United Nations Human Rights Council (UNHRC) resolution 26/09 that calls for a legally binding Treaty for Transnational Corporations (TMCs) and other business enterprises with respect to human rights. FoEI is a member of the Treaty Alliance and founder member of the Global Campaign to Dismantle Corporate Power and End Impunity.

The establishment of an international legally binding instrument to control TNCs is a long standing demand of FoEI and many other social movements and civil society networks. This initiative is an unprecedented opportunity to enshrine human rights above vested economic interest, be they: on protection of human rights and environmental defenders, on access to justice for victims of TNCs abuses and environmental crimes, and on defining obligations and sanctions for TNCs with respect to human rights violations. After at least two decades of debate around voluntary approaches for business in regards to human rights, while the UN system has increasingly opened the doors for corporate influence, a legally binding Treaty must be a tipping point in this matter and establish concrete mandatory rules for TNCs and enforceable instruments controlled by states in the public interest. The Treaty is needed now more than ever, when TNCs have in practice been provided with a shield of special rights and privileges through trade and investment agreements that consolidates their economic power, perpetuating impunity and threatening state and peoples' sovereignty.

In 2014 the Treaty proposal was supported by more than 600 organizations and 400 individuals, from 95 countries, by the Subcommittee on Human Rights of the European Parliament, by several Special Rapporteurs – including the SR on the Right to Health – and the Vatican. In June 2014 the UNHRC voted and approved the resolution presented by Ecuador and South Africa, establishing an open-ended intergovernmental working group to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of TNCs with respect to Human Rights (Res 26/9). Since then support has grown from civil society groups, social movements, affected communities, academia, parliamentarians and states[1].

This statement presents to the state members in the first session of the open-ended intergovernmental working group (OEIWG) the preliminary result of discussions within Friends of the Earth International about the proposals regarding the nature, scope and content of the Treaty, and reflects our opinion on six crucial issues for the federation that a legally binding instrument on control of TNCs regarding human right should address.

On scope and nature:

1. The Treaty should provide a framework to recognize and protect all Human Rights above TNCs privileges

The Treaty should define obligations that businesses need to respect regarding ALL human rights.
These should include Economic, Social and Cultural Rights (ESCR) as well as environmental, labor civil and political rights.
The Treaty should also reinforce states obligations to protect and respect human rights and provide judicial remedy to victims in case of violations by TNCs, including extra territorial obligations.
The treaty must define instruments to monitor, judge and apply sanctions on TNCs for human rights violations, including reparations to victims and affected communities and peoples.
The scope of these new juridical instruments under the Treaty must be mandatory and reinforce the hierarchical superiority of Human Rights framework over other treaties, including trade and investment agreements, as well as arbitration tribunals.

[1] See news at: www.treatymovement.com and the program for a Week of Mobilization from 6 to 11 of July in Geneva parallel to the OEIWG first session at: www.stopcorporateimpunity.org

2. The Treaty should aim to control and end impunity of TNCs regarding all Human Rights violations

The Treaty should establish the civil and criminal responsibility of TNCs and their executives.

While the proposed Treaty should prioritize TNCs, it should apply to all their subsidiaries and business relationships, as well as to all the companies in their global supply chains, including subcontractors and financiers, and eventually to all companies that commit or are complicit in human rights violations.
The Treaty should require States to provide legal liability (civil and criminal) in their national jurisdiction of both the TNCs and their executives (CEO, managers, administrative board) at the national level, based on the principle of double indictment.
The standards, obligations and enforcement mechanisms of the Treaty should eventually be applicable through appropriate means to all corporate human rights abuses, wherever they happen, and provide access to remedy for all victims.

On content and special provisions:

3. The Treaty should give special attention to Environmental Crimes committed by TNCs

Environmental crimes often result from TNCs operations, are committed on their behalf or as consequences of their actions[2]. TNCs must be held accountable for their direct or indirect environmental crimes, be they localized and circumstantial (or even 'accidental'), or historic and systemic.

The Treaty should include strong provisions on the obligations of TNCs to respect environmental protection laws and the implementation of the precautionary principle, including obligations to compensate victims and affected peoples, to restore ecosystems and to rehabilitate peoples livelihoods.

Destruction of the natural environment and peoples livelihoods violates the human rights to health, to water, to enjoyment of a safe, clean, healthy and sustainable environment. It can lead to the violation of other rights, such as the right to housing, to health and education, and the right to self-determination, when displacement results from environmental damage, in the form of forced eviction by mega projects, or by severe pollution, climate change or other disasters.

The Treaty should include a reference to Ecocide caused by the direct or systemic violations by TNCs. *Ecocide is* the extensive damage to, destruction of or loss of ecosystem(s) of a given territory to such an extent that peaceful enjoyment by the inhabitants of that territory has been or will be severely diminished, or when systemic death and extermination of species occur[3].

The inclusion of Ecocide in international law aims to prohibit mass damage and destruction of the Earth and creates a legal duty of care for all inhabitants – including all living beings – that have been or are at risk of being significantly harmed due to Ecocide. The duty of care applies to prevent, prohibit and pre-empt both human-caused Ecocide and natural catastrophes.

In this sense the Treaty should look for the means to assess the current or historical responsibility of TNCs regarding ecocide, when their operations lead to the threat of death or extinction of communities and ecosystems. These can be localized cases of systematic violations – such as the destruction of people's lives and livelihoods by Shell in the Niger

[2] See for example the case of Wilmar in Nigeria at: http://news.mongabay.com/2015/0528-norman-nigeria-palm-oil.html and in Indonesia at: http://business-humanrights.org/en/indonesia-friends-of-the-earth-says-wilmars-logging-violates-rights-of-local-communities-calls-on-eu-to-drop-biofuels-target
See also the cases of Shell in Nigeria, Mekorot in Palestine or Hidralia in Guatemala at: http://ejatlas.org/featured/dismantle-corporate-power

[3] From: http://eradicatingecocide.com/the-law/ecocide-act/

Delta[4] –or present broader cumulative impacts resulted of historic operations of TNCs – such as climate change as a result of systemic human right violations by TNCs of the fossil fuel industry[5].

4. The Treaty must establish a World Court on TNCs and Human Rights

The Treaty should establish a UN court on TNCs and Human Rights to assure that TNCs are held accountable for their actions abroad, including through their affiliates, sub-contractors, licensees, financiers and the other business enterprises that they have relationships with..

The World Court should be responsible for judging international crimes and human rights violations committed by TNCs and for monitoring civil and penal responsibilities and applying sanctions to TNCs and their executives.

A World Court on TNCs and Human Rights must be complementary to universal, regional and national mechanisms and guarantee that affected individuals and communities have access to an independent international legal body in order to obtain justice for all business related human rights violations.

The Court should be responsible for receiving, investigating and judging complaints against TNCs. New types of international crimes, such as ecocide and other environmental crimes, should be recognized and fall under the competence of the World Court.

To complement this Court a treaty body (committee) should be established by the Treaty to monitor its implementation, receive public input and provide oversight. A Public Centre for the Control of Transnational Corporations should be established to register, analyse, investigate and inspect the practices of transnational corporations[6].

5. The Treaty must provide means to guarantee access to justice for victims of TNCs, to protect environmental and human right defenders and to recognize the rights of affected peoples

The Treaty should ensure mechanisms to guarantee the Centrality of Victims on reporting business related human right violations and provide them access to justice and remedy, including reparation and restoration of the environment and livelihoods.

The system must allow states and affected communities to present claims against TNCs and be structured at the local, national, regional and international levels.
It must require states to monitor and regulate the operations of business enterprises under their jurisdiction, including when acting outside their national territory, with a view to prevent the occurrence of abuses of human rights in the course of those operations.
It must require states to provide access to an effective remedy by any state concerned, including access to justice for foreign victims that suffered harm from acts or omissions of a business enterprise in situations where there is no basis for the states involved to exercise their territorial or extraterritorial obligations[7].

The Treaty must protect the right to defend human rights (including environmental rights) and Environmental Defenders: people in local communities and environmental campaigners who are often victims of intimidation and human rights violations by corporations, suffering acts of violence against them and violations of their rights.

Conflicts over territory and natural resources lead to business related violations of human rights as well as rights violations against environmental defenders. Environmental defenders who uphold the right of communities to determine

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[4] See more about Shell court case on: https://milieudefensie.nl/english/shell/courtcase

[5] See demands of the MOVIAC – Movement of Victims and Affected Peoples by Climate Change and Transnational Corporations in Central America, at: http://radiomundoreal.fm/Real-Change-from-the-Bottom-Up?lang=en and at: http://radiomundoreal.fm/Declaracion-de-San-Salvador?lang=en

[6] See Peoples Treaty base document – Juridical Dimension at: *www.stopcorporateimpunity.org/?page_id=5534*

[7] For example, in the case of victims of Mekorot in Occupied Palestine. See more on BDS campaign at: http://www.bdsmovement.net/tag/mekorot

their own development path in opposition to corporate-driven mega projects are subject to many types of human rights abuses, often committed by corporations or on their behalf. [8] Corporate social responsibility strategies have failed to stop human rights violations and environmental destruction[9], and instead have been used to cover up corporate abuses of communities, the environment, and of environmental defenders.

FoEI demands that the Treaty recognizes the rights of environmental defenders in legitimate defense of territories and human rights and to improve mechanisms to keep them safe.

The more specific definition of the concept of Affected Peoples and the recognition of their rights is demanded by movements of workers, peasants, indigenous peoples, women, people affected by dams, plantations, mining and other extractive activities and climate change as a consequence of systemic operations of corporations. There is a need for their rights access to reparation to be codified in rights at the international level[10].

This lack of legal recognition or of an international framework to protect affected peoples rights allows that peoples affected by the same corporations or corporate practices be treated differently in different states, by different (or the same) corporations who commit human rights violations.

The narrow or limited definition of the concept of people affected by corporations and the different forms of redress awarded in each case can be explained by the lack of recognition of affected peoples' gains as rights: there is no national or international legal framework to guarantee these rights.

FoEI supports social movements affected by transnational corporations mobilizing to obtain redress for the violation of their economic, social, cultural and environmental rights, and to have the concept of the rights of affected people by corporations regulated at the national and international levels.

The creation of a legal framework in the Treaty that recognizes the rights of affected peoples – by dams, mining or other activities as well as by systemic environmental crimes committed by corporations, such as the case of climate change – would represent social movement gains be legally recognized as rights.

On process and participation:

6. The OEIWG should establish clear rules of participation to prevent corporate capture regarding the Treaty process

The existing rules for the participation of observers with ECOSOC status in the OEIWG should be applied as a minimum standard to limit corporations' influence on Treaty negotiations.

The Treaty should address the needs and realities of people and communities whose human rights have been infringed, or are being threatened, by corporate conduct. Special attention and priority should be given to the participation of representatives from communities and organizations of people affected by transnational corporations and other business enterprises.

As the Treaty should target TNCs, the OEIWG process should guarantee no undue influence by corporations on negotiations, establishing further criteria preventing corporate capture of the Treaty process. It is not for businesses to decide what sanctions should be imposed on them if they themselves are involved in human rights violations.

The corporate capture – often through sponsorship, lobbying, revolving doors, as part of official delegations or as stakeholders in negotiations – is all too common in the UN and other international spaces, and has resulted in ineffective voluntary approaches to dealing with corporate misconduct regarding human rights violations and weak global environmental policies[11].

The Treaty brings an historic opportunity for a UN turnaround on the issue of corporate capture, setting higher UN standards to limit business influence on international policy-making spaces.

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[8] See FoEI Report on Environmental Defenders *We defend the environment, we defend human rights* (2014) at: http://www.foei.org/resources/publications/publications-by-subject/human-rights-defenders-publications/we-defend-the-environment-we-defend-human-rights

[9] See for example the case Anglo America and El Cerrejón coal mine in Colombia *How corporations rule Part 4: Anglo American's dirty energy lobby and its false climate solutions* (2014) at: http://www.foei.org/wp-content/uploads/2014/11/17-foei-corporate-capture-report-eng-lr.pdf

[10] See Peoples Treaty base document – Alternatives Dimension at: www.stopcorporateimpunity.org/?page_id=5534

[11] Se FoEI Report *Reclaim UN from Corporate Capture* (2012) at: http://www.foei.org/wp-content/uploads/2013/12/Reclaim-the-UN.pdf